United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,241

41

LEROY R. SESSOMS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM CRIMINAL JUDGMENT

OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 1 1 1965

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QUESTIONS PRESENTED

(1) Did the District Court commit prejudicial and reversible error in refusing to grant Appellant's motion for the appointment of an independent expert?

(2) Did the trial judge commit prejudicial and reversible error by limiting Appellant's cross-examination of the government psychiatrist?

(3) Was the Appellant prejudiced and prevented from having a fair trial by the instructions given by the trial judge in response to a question tendered by the jury while deliberating?

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LEROY R. SESSOMS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM CRIMINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the appellant from an order entered on the 8th day of January, 1965, by the United States District Court for the District of Columbia, adjudging

appellant Leroy R. Sessoms guilty of theft of letters from an authorized mail depository and theft of the checks contained in the letters stolen, and imposing a sentence of one to three years.

This Court has jurisdiction of this appeal under Title 28, Section 1291 of the U.S. Code.

STATEMENT OF THE CASE

The indictment charged that on or about July 17, 1964, the appellant stole from the mail box at premises 602 Fifth Street, Northwest, letters, and extracted the checks in such letters, addressed to John and Jean Dwyer, 602 Fifth Street, Northwest, and did unlawfully have these checks in his possession, in violation of Section 1708 of Title 18 of the United States Code.

Prior to the trial, the appellant had been sent to St. Elizabeth's Hospital under a Court Order for a ninety-day mental examination at the request of defense counsel. The report from St. Elizabeth's Hospital indicated that the appellant was competent to stand trial and was not on or about July 17, 1964, suffering from a mental disease or defect.

Counsel for the appellant then moved for the

appointment of an independant psychiatrist before Chief Judge McGuire on December 3, 1964. He notified the Court that a doctor from the Mental Retardation Committee for the District of Columbia indicated that he would examine the appellant without compensation, and all he required was an order from the Court. (Hr.A2).[1] The Court was further informed that the diagnosis of St. Elizabeth's Hospital indicated that the appellant had a border-line mental defect. (Hr.A2). In addition, it was noted by counsel that the appellant had been discharged from the Navy as a moran. The Chief Judge then directed the government to inquire into the possibility of civilly committing him (Hr.A3); and denied his motion without prejudice. (Hr.A4).

On December 9, 1964, counsel for the appellant renewed his motion, stating to the Court that he had "spoken with the Bureau of Mental Retardation and they said that there would be no fee for an examination and all that would be required would be a Court Order." (Hr.B2.)[2] The Court was informed that this Bureau specialized in the care of the mentally retarded and was staffed with

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1/ Hr.A refers to the hearing before Chief Judge McGuire on December 3rd, 1964.

2/ Hr.B refers to the hearing held before Chief Judge McGuire on December 9th, 1964.

psychiatrists and psychologists. (Hr.B3). The government announced to the Court that St. Elizabeth's Hospital would not recommend a civil commitment since it did not consider the appellant a mental deficient. (Hr.B2). The motion was denied.

On December 11, 1964, counsel for the appellant again renewed his request for an examination by an independent psychiatrist, stating that such person from the Bureau of Mental Retardation would come to the jail and interview the appellant (Hr.C6).3/ The Chief Judge then stated that "I won't do it. I am not going to start that business unless I am directed to." (Hr.C6.) This appeal is from the Court's denial of the appellant's motion for the appointment of an independent psychiatrist.

These charges were tried before a jury in the United States District Court for the District of Columbia before the Honorable Alexander Holtzoff on December 15th, 16th, and 17th, 1964. The complaining witnesses testified that they were expecting some checks on July 17, 1964, and that they did not arrive. Mr. Dwyer testified that the appellant came into his law office that afternoon about four o'clock and asked to see Mrs. Jean Dwyer, his attorney,

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3/ Hr.C refers to the hearing held before Chief Judge McGuire on December 11, 1964.

who was not there. A conversation followed between Mr. Dwyer and the appellant, and as a result of that conversation the appellant produced from inside his coat pocket and handed to him the letters referred to in the indictment addressed respectively to Mr. Dwyer and Mrs. Dwyer, and the checks contained in those envelopes.

At the trial, the principal issue was insanity. On this issue, the appellant's mother testified for the defense that in her opinion her 42 year old son had a child's mind. (Tr.67). Mrs. Dwyer, the complaining witness, testified that she had spoken personally with the appellant's mother and had written her several letters urging that Leroy Sessoms be placed in St. Elizabeth's Hospital for observation, (Tr.55), concerning his intellectual capacity. (Tr.57). Mrs. Picking testified that on the day in question the appellant's mental condition was "very abnormal." (Tr.43.) Mrs. Price testified that on the 16th of July, 1964, a money order for forty dollars was mailed from the Workhouse Division, Finance Office, Occoquan, Virginia, by an inmate there, Edward Shafer, to Attorney Jean Dwyer to be given to Leroy Sessoms.(Tr.47).

Counsel for the appellant read to the jury from certain psychiatric reports that the appellant had been diagnosed as having a sociopathic personality of severe

type by the Chief of Psychiatry at the United States Penitentiary in Atlanta, Georgia in 1962, (Tr.130), and having been classified by the Navy Psychiatric Board in 1942 as mentally defective at the moron level (Tr.130), and from the psychological tests administered at St. Elizabeth's Hospital in 1964. (Tr.131-134).

Mr. Dwyer testified for the Government that in his opinion he saw nothing unusual in appellant's behavior on the 17th of July, 1964. (Tr.102). Dr. Mauris Platkin, a psychiatrist from St. Elizabeth's Hospital, testified that the appellant was without mental disorder, (Tr.75), although he was borderline between normal and subnormal intelligence. (Tr.83,98).

Dr. Platkin had testified that he had based his opinion on a review of appellant's entire record "as we had it." (Tr.75.) Counsel for appellant commenced a cross-examination designed partially to test Dr. Platkins familiarity with the records upon which his expert opinion had in part been based and also to confront the witness with portions of said record probably inconsistent with his opinion. During the course of the examination the trial judge, over an objection by counsel, prohibited him from tendering to the witness questions concerning the contents of the records because they had not been introduced in

evidence. (Tr.89,90). When, in order to continue cross-examination, the records were introduced in evidence, (Tr.92), counsel was prohibited from tendering similar questions because stated the trial judge, once in evidence "the document speaks for itself." (Tr.95.) Counsel objected to this limitation placed upon his cross-examination (Tr.94). The only course permitted counsel was to read to the jury the records in question at a "proper time." (Tr.97.) This appeal is from the refusal of the Court to allow counsel to cross-examine Dr. Platkin on those records which he stated he relied upon in forming his opinion.

While deliberating, the jury addressed three questions to the trial judge, one of which is as follows: "If the jury determines that the defendant had a mental defect at the time of the crime, would this be sufficient grounds to bring in a verdict of not guilty by virtue of insanity?" (Tr.157.) In instructing the jury with reference to this question, the trial judge indicated that before a verdict of acquittal by reason of insanity could be returned the jury must have concluded that the government did not meet its burden of proving beyond a reasonable doubt that the acts constituting the crime were not the product of a mental defect. (Tr.165). He then stated the government's contention that Dr. Platkins'

testimony was sufficient to meet the burden and added that "there is no evidence to the contrary as I understand it." (Tr.165.) No objection was taken to such remarks. The trial judge noted at a bench conference after the jury retired to the jury room that "it is a very close case of mental defect." (Tr.168.) This appeal is from the Court's reply to the above question by the jury.

STATEMENT OF POINTS

I. The District Court erred in failing to grant appellant's motion for the appointment of an independent expert, where adequate averment had been made to the Court.

II. The trial Court erred by not allowing appellant's counsel to cross-examine a government psychiatrist on the contents of the records which were admittedly a part of the basis for the expert's opinion.

III. The trial Court erred while instructing the jury in response to a question tendered by them while deliberating.

SUMMARY OF ARGUMENT

I.

Counsel for the appellant moved on three different

occasions on adequate averment before the District Court for the appointment of an independent psychiatrist. The failure of the District Court to grant this motion constitutes reversible error. On proper averment, the right to be examined by an independent expert has been recognized in the District of Columbia. See Cooper & Kennedy v. United States, infra and Brown v. United States, infra. The record in this case demonstrates the prejudicial effect of this denial since the appellant was forced to go to trial without any expert testimony.

II.

The trial Court would not allow appellant's counsel to cross-examine a government psychiatrist on the contents of the records which were admittedly a part of the basis for the expert's opinion. Such a limitation by the trial Court, under the authorities of the Supreme Court and this and other Circuits, constitutes reversible error.

III.

The trial judge, after the jury inquired into the consequences of a finding that the appellant was suffering from a mental defect, instructed the jury that

the burden of proof on the question of causation was upon the government; then mentioned the government's contention that the expert testimony sufficed to discharge the burden; and added that "there was no evidence to the contrary as I understand it." Such an instruction constitutes reversible error.

ARGUMENT

I

THE DISTRICT COURT ERRED BY REFUSING TO GRANT APPELLANT'S MOTION FOR THE APPOINTMENT OF AN INDEPENDENT PSYCHIATRIST. 1/

In Cooper & Kennedy v. United States, ____ U.S. App. D.C. ____, 337 F.2d 538 (1964), Judge Wright stated, in a concurring opinion, at 539, the following:

> "I agree with Cooper that, in a proper case, the District Court should appoint independent experts, at Government expense, to assist an indigent defendant and to provide expert psychiatric testimony. An indigent defendant cannot be offered Government doctors as experts on a take-it-or-leave-it basis, particularly where those doctors have already indicated their testimony would be adverse to his interests. Where the Government doctors at St. Elizabeths, for example, have reported that, if called, their testimony would favor the Government, the trial court may look elsewhere for psychiatric assistance for the indigent defendant."

1/ With respect to Point I, appellant desires the court to read the following pages of the reporter's transcript: Hr.A2-4, HrB2-5, Hr.C5-6.

Judge Wright noted that the court has the power, under Rule 28, Fed. R. Crim. P., to appoint such independent experts. Furthermore, he stated, at 539, that the Commission on Mental Health and the Legal Psychiatric Service are available for help and "must be considered by, the District Court in determining whether or not psychiatric assistance and expert testimony, other than that offered by the Government doctors at St. Elizabeths, should be made available to assist the indigent defendant."

In Brown v. United States, 118 U.S. App. D.C. 76, 77, 331 F.2d 822, 823 (1964), the Court stated:

> "On adequate averment, the defendant has the right to assistance of the court in developing the basis for his insanity defense. See Cooper and Kennedy v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (Nos. 17,669 and 17,670, decided April 9, 1964) (Concurring opinion). This assistance may take the form of a commitment for mental examination, examination through the Mental Health Commission or the Legal Psychiatric Service, or the appointment of private experts for this purpose. Ibid; Rules 17 (b) and 28 F.R.Cr.P; 21 D.C. Code §308 (1961); 24 D.C. Code §106 (1961)."

In the recent case of Green v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No.18,176, decided July 1, 1965), Chief Judge Bazelon noted the following, slip op. at 6, n.3, by way of footnote:

> "A patient has a right to independent psychiatric assistance where psychiatric inquiry undertaken

> by the state may be slanted to the state's interests, Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962); Cooper & Kennedy v. United States, ___ U.S. App. D.C. ___, 337 F.2d 538 (1964) (concurring opinion), and should be afforded such assistance in suitable cases even though no such risk appears, Brown v. United States, 118 U.S. App. D.C. 76, 331 F.2d 822 (1964); DeMarcos v. Overholser, 78 U.S. App. D.C. 131, 137 F.2d 698 (1943); Whalem v. United States, No.18067, decided April 23, 1965, slip op. p. 22 (dissenting opinion)."

The right to be examined by an independent expert has been recognized in the District of Columbia in habeas corpus proceedings brought by inmates of mental institutions: Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962); DeMarcos v. Overholser, 78 U.S. App. D.C. 131, 137 F.2d 698 (1943).

Thus, in the District of Columbia, on adequate averment, the District Court must and has assisted the indigent defendant in obtaining an independent expert. In the instant case, the court was apprised of the fact that the doctors at St. Elizabeth's Hospital indicated their testimony would be adverse to the appellant and that the defense in the case was insanity. The judge was informed that their diagnosis did indicate, however, that the appellant was of border-line intelligence. Also, the fact that the appellant was released from the Navy with an I.Q. of 61 and a moron classification was presented.

On such information, the judge had the government look into the possibility of civilly committing the appellant to a mental institution.

Since, as the record indicates, mental defect was in issue, counsel for the appellant had spoken with a psychologist at the Bureau of Mental Retardation for the District of Columbia who indicated his willingness to interview the appellant in jail without any compensation; and all the doctor required was a Court Order. Such information was made known to the judge.

In view of these circumstances, the appellant submits that an adequate showing for the appointment of a doctor at the Bureau of Mental Retardation was made. The denial of such motion clearly prejudiced the appellant since he was forced to go to trial without any expert testimony. For these reasons, the court committed error in refusing to grant appellant's motion for the appointment of an independent expert.

II

THE TRIAL JUDGE ERRED IN LIMITING APPELLANT'S CROSS EXAMINATION OF THE GOVERNMENT PSYCHIATRIST AND PREVENTED HIM FROM HAVING A FAIR TRIAL.[1]

A. The Limitation Constituted a Violation of

1/ With respect to Point 2, appellant desires the court to read the following pages of the reporter's transcript: Tr.75, 89, 90, 92, 93-97, 106, 135.

the Appellant's Constitutional Right to Cross-Examine Witnesses Against Him.

In Alford v. United States, 282 U.S. 687, 691 (1930), the Court declared: "Cross-examination of a witness is a matter of right." The Eighth Circuit stated in Heard v. United States, 255 F. 829, 832 (8th Cir. 1919), and this Court reiterated in Lindsey v. United States, 77 U.S. App. D.C. 1, 2, 113 F.2d 368, 369 (1942), the rule that:

> "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

The trial judge in the Lindsey case, supra, had disallowed, after the insanity defense had been raised, questions tendered to government experts with regard to: (1) the duration of psychotic conditions afflicting mental deficients; (2) whether the expert's contention of malingering was disproven by a similar course of conduct in a situation where appellant had no reason to malinger; and, (3) whether the expert was willing to consider, in formulating his opinion, the report of an institution wherein appellant had previously been confined (which report was in evidence) to the effect that appellant was insane. This Court concluded:

> "In view of the fact that the cross-examination in the Alford case went to collateral matters touching credibility, whereas the cross-examination denied in the instant case, was, as will appear below, directed to a critical issue, the recognition of the Alford case that cross-examination is a matter of right applies with great force." 77 U.S. App. D.C. at 3, 113 F.2d at 370.

Experts testified on both sides in the Lindsey case, supra. In the case at hand, however, the appellant was unable to secure the appointment of an independent psychiatrist and because of his indigency, unable to employ one. The absence of expert testimony supporting the insanity defense made it incumbent upon the appellant to nullify the testimony of the government's expert witness. The only device available to accomplish this objective was an exhaustive cross-examination to attempt to show that prior medical records, admittedly a part of the basis for the expert's opinion, contained indications that the appellant was suffering from a mental disease or defect at the time of the alleged crime; that such records were inconsistent with the expert's opinion, and that perhaps the witness had not fully familiarized himself with the records before formulating his opinion. By limiting cross-examination so that the witness could not be questioned concerning the contents of the records in question, such attempt was foreclosed. Therefore, the rule

seen in the Alford, Heard, and Lindsey cases, supra, applies with even greater force to the instant case.

B. The Limitation Constituted an Abuse of the Trial Judge's Discretionary Control Over the Extent of Cross-Examination.

Even if it be conceeded that the appellant was accorded "...an opportunity substantially to exercise the right of cross-examination [so] that discretion becomes operative;" Lindsey, supra at 3, 113 F.2d at 369, the exercise of discretion in the instant case constitutes an abuse thereof which demands reversal. In District of Columbia v. Clawans, 300 U.S. 617 (1936), the Court stated, at 632, that although:

> "(t)he extent of cross-examination rests in the sound discretion of the trial judge . . . .the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate... passes the proper limits of discretion and is prejudicial error."

Thus, to limit cross-examination so that disclosure of matter material to the issue is prevented constitutes reversible error. Dickson v. United States, 182 F.2d 131 (10th Cir. 1950).

This Court has repeatedly emphasized that the principal function of an expert, testifying on the issue of criminal responsibility, is informative in nature.

Holloway v. United States, 80 U.S. App. D.C. 3, 148 F.2d 665 (1945); Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 826, 45 A.L.R.2d 1930 (1954); Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (1956). The information which should be placed before the jury, from which emerges the value of expert testimony, was described by Circuit Judge Prettyman in Carter, supra, at 236, 252 F.2d at 617:

> "The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion."

The reason why such information is not only of great value, but necessary,is that a reliance upon conclusory testimony from experts on the issue constitutes an abrogation of the jury's responsibility to determine whether the defendant is criminally responsible for the acts charged. McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); Rollerson v. United States, ____U.S. App. D.C.____,____F.2d____(1965) (slip opinion no. 17,675, decided October 1, 1964). Also, the jury should know the data upon which a psychiatrist or psychologist bases his opinion in order that it may

properly evaluate the opinion. In addition, as this Court stated in Jones v. United States, 111 U.S. App. D.C. 276, 283, 296 F.2d 398, 405 (1961);

> "An expert thus testifying is always subject to cross-examination or inquiry upon rebuttal as to the data upon which he premised his opinion."

In the Rollerson case, supra, at 4, slip opinion, the Court felt called upon to warn that "the frequent failure to adequately explain and support expert psychiatric opinion threatens the administration of the insanity defense in the District of Columbia." The instant case, because of the limitation placed on cross-examination of the only expert witness to testify, furnishes a graphic example of the above mentioned failure. The expert testified on direct that in his opinion the appellant was "without mental disorder or defect" on the day of the alleged crime and that his opinion was based in part upon "a review of his [appellant's] entire record as we had it." (Tr.75).

Cross-examination elicited the fact that the record in question contained "rather lengthy", (Tr.88), reports regarding the appellant's mental condition which had been compiled by various branches of the Federal Government over a period of time extending from 1942 to the time of his pre-trial confinement in St. Elizabeth's

Hospital. During the course of the cross-examination concerning the contents of the record counsel was repeatedly interrupted by the trial judge who finally prohibited further questioning on that subject until the reports were introduced in evidence. When in order to continue cross-examination counsel introduced the record he was again prohibited from further questioning the expert concerning its contents because, "the document speaks for itself." (Tr.96.)

Portions of the reports which were subsequently read to the jury, (Tr.128-134), are probably inconsistent with the opinion rendered by the expert on the issue of criminal responsibility. To claim that the mere reading of certain medical records to the jury is equivalent to cross-examining the doctor on those records is to lose sight of the realities of a trial by jury. The trial judge certainly knew the difference, as he told the jury in his charge the following: "However, there is no testimony as to what [medical records] that diagnosis means, whether it amounts to a mental disease or a mental defect or not." (Tr. 153-154.) Furthermore, the trial judge again expressed his opinion of the ineffectiveness of such a procedure by telling the jury, on the issue of productivity: "..., and there is no evidence to the contrary, as I understand

it." (Tr.165.)

The above-cited authorities indicate that the subject matter of the cross-examination was appropriate and that its exploration was necessary in order that the jury understand the material from which the expert opinion was fashioned. Further, probable inconsistencies made it imperative that the jury understand the reasoning by which the expert progressed from his material to his conclusion. The limitation imposed foreclosed all further inquiry in this appropriate area and hence was an abuse of discretion.

Such abuse of discretion prejudiced the appellant's trial. Prejudice is shown by determining whether "...the activities of the trial judge may...have prejudiced the defendant, not withstanding the strong evidence presented against him." Jackson v. United States, 117 U.S. App. D.C. 325, 326, 329 F.2d 893, 894 (1964); quoted in Young and Simmons v. United States, ___U.S. App. D.C.___, ___F.2d ___(slip opinion nos. 18,615 and 18,662, decided March 19, 1965). Thus, a possibility of prejudice is sufficient to justify reversal.

The purposes and importance of exhaustively cross-examining the only expert witness presented at the appellant's trial are indicated above. Even though such

cross-examination was not permitted the jury was sufficiently impressed with the appellant's insanity defense to request, after deliberating one hour and forty five minutes, an instruction which indicated that it was considering a finding that the appellant was suffering from a mental defect. It also requested at that time the documents constituting the principal evidence thereof. Furthermore, the trial judge noted: "It is a very close case of mental defect." (Tr.168.) There exists at the very least a possibility that, had an exhaustive cross-examination of the government's expert been permitted: (1) the above-mentioned purposes of the cross-examination would have been accomplished; (2) the impact of the expert's opinion would have been lessened; and (3) the weight of the appellant's evidence on the insanity issue would have been commensurately increased. The possibility, which might better be described as a probability, is sufficient to justify a finding that the abuse of discretion in the instant case prejudiced the appellant.

III

INSTRUCTIONS GIVEN BY THE TRIAL JUDGE IN RESPONSE TO A QUESTION TENDERED BY THE JURY PREJUDICED THE APPELLANT AND PREVENTED HIM FROM HAVING A FAIR TRIAL.[1]

1/ With respect to Point 3, appellant desires the court to read the following pages: Tr. 165,168.

The instruction given by the trial judge either imposed upon the appellant the burden of proving that the acts charged were the product of a mental disease or defect or, at best, was equivocal upon the question of the burden of proof. Upon the introduction of some evidence to rebut the presumption of sanity the government assumes the burden of proving beyond a reasonable doubt that the defendant is criminally responsible. Davis v. United States, 160 U.S. 469 (1895). The critical elements of such burden are a showing that the defendant had no mental disease or defect or, if he did, that the acts charged were not the product of the disease or defect. Durham, supra.

In the instant case, the trial judge, after the jury inquired into the consequences of a finding that the appellant was suffering from a mental defect, instructed the jury that the burden of proof on the question of causation was upon the government; then mentioned the government's contention that the expert testimony sufficed to discharge the burden; and added that "there was no evidence to the contrary as I understand it." (Tr. 165.) Such an instruction, because it focuses the attention of the jury on the purported failure of the appellant to introduce evidence on the question of causation, is at

least susceptible of an interpretation that the burden of proof thereof rested upon the appellant. Such an interpretation clearly contravenes the rule of the Davis case, supra, and the possibility that the jury may have so interpreted the instruction contravenes the principle that a "conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946).

Furthermore, the instruction foreclosed consideration by the jury of evidence which should properly have been considered in reaching a conclusion on the question of criminal responsibility. It is noted that the defendant need produce some evidence of mental illness only so as properly to assert the defense, and there is a presumption from such evidence that the alleged mental illness produced the offenses. Thus, evidence of mental illness alone destroys any presumption of non-productivity. Goforth v. United States, 106 U.S. App. D.C. 111, 269 F.2d 778 (1959); Logan v. United States, 109 U.S. App. D.C. 104, 284 F.2d 238 (1960); Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954); United States v. Amburgey, 189 F. Supp. 687 (D.D.C. 1960).

In Misenheimer v. United States, 106 U.S. App. D.C. 220, 221, 271 F.2d 486, 487 (1959), cert. denied,

361 U.S. 971 (1960), and again in Campbell v. United States, 113 U.S. App. D.C. 260, 307 F.2d 597, 600 (1962), this Court delineated the appropriate scope of a jury's inquiry into the question of causation: "Upon that issue, the jury's range of inquiry is not to be limited to particular symptoms, but may include, under proper instructions, any symptoms and manifestations of mental disorder." By stating that there was no evidence introduced by the defendant to prove a causal connection between the alleged mental defect or disease and the acts charged, the trial judge foreclosed jury consideration of the evidence of the mental defect and disease as tending to establish the necessary causal connection. Such a foreclosure is a clear violation of the rule stated in the Misenheimer and Campbell cases, supra.

Although an attempt at clarification was made when the trial judge immediately added: "Now whether that is sufficient or not would be for you to determine. I have just told you what the contention is," (Tr.165), little clarification was accomplished. The "that" referred to in the first of the above-quoted sentences might have been the government's contention alone (and this interpretation is reinforced by the mention of "the

contention" in the second of the above-quoted sentences); the sufficiency of both the government's and the appellant's evidence; or to the sufficiency of the defendant's evidence alone. In any case, the principle quoted above from the Bollenbach case, supra, seems even more applicable to this facet of the instruction.

In addition, such instructions constituted an unwarranted expression by the trial judge on the weight of the evidence. In Quercia v. United States, 289 U.S. 466, 470 (1933), the Court stated: "This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'" (emphasis added). Here the Court noted that the judge's comment was not cured by a warning that his opinion of the evidence was not binding on the jury. See also Bollenbach v. United States, 326 U.S. 607 (1946); Bihn v. United States, 328 U.S. 633 (1946); United States v. Murdock, 290 U.S. 389 (1933); Hicks v. United States, 150 U.S. 442 (1893); Starr v. United States, 153 U.S. 614 (1894); Hickory v. United States, 160 U.S. 408 (1896).

This Court has, in Billeci v. United States, 87 U.S. App. D.C. 274, 283, 184 F.2d 394, 403 (1950), stated the following:

> "He [judge] cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of guilt or innocence of the accused."
>
> "When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt."

On the issue of whether the trial judge cured such comment by stating that the sufficiency was for the jury to determine, Judge Robb, in Smith v. United States, 55 U.S. App. D.C. 117, 119, 12 F.2d 919, 921 (1924), noted, in an analogous situation, that "...the cause of the defendant was so prejudiced by what the court already had said that the latter expression had little, if any, tendency to undo the harm already done...."

Since one of the ultimate issues to be decided by the jury was productivity, the court's statement was also tantamount to expressing the court's judgment that

the appellant was guilty. On this question, this Court stated, in Sullivan v. United States, 85 U.S. App. D.C. 409, 411, 178 F.2d 723, 725 (1949), the following:

> "Comment upon evidence must be distinguished from expression of an opinion upon an ultimate issue determinative of guilt or innocence. The ill effect cannot be offset by instructing the jurors that the court's opinion is not binding on them and that they are the sole judges of the facts. Fryer v. U.S., 7 Cir., 1926, 11 F.2d 707, 708. We think, as did this court in Smith v. U.S., 1924, 55 App. D.C. 117, 2 F.2d 919, 921, that such statements have little, if any, tendency to undo the harm already done. The influence of the trial judge on the jury is of great weight, and his lightest word or intimation is received with deference and may prove controlling. Querica v. U.S., 1933, 289 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321. This is especially so in a criminal trial."

No objection was made to the trial judge's answer of the jury's second question, however, it is contended that it was so plainly erroneous that this Court should notice the error under Rule 52(b), Fed. R. Crim. P. This error was not committed in the course of a lengthy charge to the jury. Secondly, the trial court's answer went to the basic issue of the case. Thirdly, since the trial court's reply was prompted by a note from the jury while deliberating, it indicates the importance the jury attached to such answer. Fourthly, as the trial judge noted: "It is a very close case of mental defect." (Tr.168.)

CONCLUSION

For the reasons stated above, it is urged that the judgment of conviction against the appellant be reversed and remanded for a new trial.

Respectfully submitted,

E. Grey Lewis
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,241

LEROY R. SESSOMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia
FILED SEP 4 1965
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CLERK

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Cr. No. 763-64

QUESTIONS PRESENTED

In the opinion of the appellee. the following questions are presented.

1. Did the District Court abuse its discretion in denying a motion for an independent psychiatric examination made on the eve of trial, where the only showing in support of the motion was that the results of an IQ test administered by Saint Elizabeths Hospital differed by fourteen points from one administered by the Navy twenty-two years before?

2. Was appellant's examination of the government's expert psychiatric witness unduly limited by the trial court where all of the evidence that appellant sought to introduce was received?

3. Was the trial court's brief and accurate comment on the evidence in response to the jury's question improper, where the jury had been fully instructed that such comments were not binding; and, in any event, may appellant make his objection to the comment for the first time on appeal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,241

LEROY R. SESSOMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal [1] is from a judgment sentencing appellant to imprisonment for one to three years, concurrently, upon his conviction of four counts of mail theft.[2]

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[1] Appellant's application to proceed on appeal without prepayment of costs was denied by the trial court as "frivolous and not taken in good faith." His subsequent application to this Court was granted on March 11, 1965.

[2] The indictment contained six counts drawn under 18 U.S.C. § 1708: (1) stealing a letter addressed to Jean Dwyer; (2) removing the contents of the letter addressed to Jean Dwyer; (3) having possession of the contents of the letter addressed to Jean Dwyer; (4) stealing a letter addressed to John Dwyer; (5) remov-

At appellant's arraignment on August 24, 1964, three days after the indictment was filed, the District Court, *sua sponte*, ordered appellant committed to Saint Elizabeths Hospital for a mental examination. On October 15, 1964, the Superintendent of Saint Elizabeths Hospital certified that appellant was competent to stand trial and was not then or on the date of the alleged offenses, July 17, 1964, suffering from a mental disease or defect. On December 3, 9, and 11, 1964, appellant's court-appointed attorney appeared in open court and unsuccessfully moved for an independent psychiatric examination. In support of the motion, counsel represented that appellant "was released from the Navy and given the diagnosis of a moran [*sic*]" (Hr.A 3).[3] He said that a representative of "the Bureau of Mental Retardation . . ., a department over at the D. C. General Hospital . . . [whose] function is to specialize in taking care of mentally retarded individuals . . ., would come see him in jail . . . . [T]here would be no fee for an examination and all that would be required would be a Court Order." (Hr.B 2-3; Hr.C 6.) In finally denying this motion, the court said, "I won't do that. Why should I? He has been sent to the proper establishment, St. Elizabeths Hospital, and they have made a finding of competency. If we are going to start this

---

ing the contents of the letter addressed to John Dwyer; and (6) having possession of the contents of the letter addressed to John Dwyer. Each offense was alleged to have been committed on July 17, 1964. The stealing counts (1 and 4) and the removing counts (2 and 5) were submitted to the jury as exclusive alternatives of the possession counts (3 and 6), and the jury returned verdicts of guilty on the former counts (1, 2, 4, and 5), and not guilty on the latter counts (3 and 6).

[3] We adopt appellant's forms of citation to the several transcripts, as follows: "Hr.A" refers to the transcript of proceedings before Chief Judge McGuire on December 3, 1964; "Hr.B" refers to the transcript of proceedings before Chief Judge McGuire on December 9, 1964; "Hr.C" refers to the transcript of proceedings before Chief Judge McGuire on December 11, 1964; "Tr." refers to the transcript of the trial before Judge Holtzoff on December 15, 16, and 17, 1964.

business, we will never finish with it." (Hr.C 5-6.) The trial commenced on December 15, 1964.

By testimony and stipulations whose sufficiency appellant does not challenge, the Government proved appellant's commission of the criminal acts with which he was charged (Tr. 6-24, 27-40). The only controverted issue, which gives rise to the questions on this appeal, was appellant's responsibility.

Three lay witnesses testified on appellant's behalf. A person whom appellant asked to cash one of the stolen checks on the day after the offenses testified that "he was a very abnormal—his conduct was abnormal" (Tr. 43). Attorney Jean Dwyer, one of the complaining witnesses, testified that her conversations before the offenses with appellant and appellant's mother had led her to have "a question as to his intellectual capacity" (Tr. 55, 57). Appellant's mother testified that several of appellant's relatives had been in the State Hospital at Raleigh, North Carolina; that appellant, who was 42 years old at the time of trial, had left school in the fifth grade and had an irregular employment history since then because "he just couldn't learn"; that "he got a discharge from the Navy because his IQ was just 61"; and, in summary, that "he's just got a child's mind, he just can't learn, and it's just one of the things he can't help. He is just a child yet, is the way I see it, all the time." (Tr. 61-63, 65-67.)

In rebuttal, the Government called attorney John Dwyer, one of the complaining witnesses, and Dr. Mauris Platkin, a psychiatrist on the staff of Saint Elizabeths Hospital. Mr. Dwyer testified that on the day of the offenses, appellant "was oriented as to the time and the place and as to what he was doing there, and I saw nothing at all unusual in his behavior. . . . I had no reason to believe there was anything mentally wrong with him." (Tr. 102.) Dr. Platkin testified that he had examined appellant at a staff conference attended by himself, another psychiatrist, and a psychologist (Tr. 74). He had formed an opinion of appellant's mental condition "based on a review of his entire record as we had it, his history, the

difficulties he had been in, his life history, contact with relatives, contact with other institutions, psychological examinations, personal interviews, evaluation while in the hospital, all examinations, physical and special examinations that were indicated. And on the basis of all of these examinations it was my opinion that he was not suffering from a mental disorder or mental disease or defect" at the time of the alleged offenses. (Tr. 75.) Dr. Platkin saw "no significant connection" between appellant's tested intelligence quotient of 75 ("in a borderline range," "between normal intelligence and subnormal intelligence") and the alleged offenses (Tr. 83-84, 99).

During the cross-examination of Dr. Platkin, appellant's counsel attempted to elicit testimony about the contents of various reports obtained by Saint Elizabeths from other agencies which had examined appellant in the past. However, he was not allowed to ask questions in the form, "does that record indicate that . . .?" (Tr. 89-90, 93-96). Rather, the records themselves were received in evidence and appellant's counsel was allowed to read them to the jury (Tr. 90-92, 128-134).

After instructions satisfactory to both sides (Tr. 155), the jury retired to deliberate (Tr. 156). An hour and three-quarters later, it sent in a note, asking, *inter alia*:

> "If the jury determines that the defendant had a mental defect at the time of the crime, would this be sufficient grounds to bring in a verdict of not guilty by virtue of insanity?" (Tr. 157.)

The court's oral reply was that

> "It would be [sufficient] unless the government proves beyond a reasonable doubt that there was no causal connection between the mental defect and the crime. That means that the burden is on the government to show the negative. Now, as I understand it, the government contends that Dr. Platkin's testimony is sufficient to disprove any causal connection, and there is no evidence to the contrary, as I understand it. Now whether that is sufficient or not would be

for you to determine. I have just told you what the contention is." (Tr. 165.)

Neither side objected to this reply.

A verdict was reached the next day, see note 2, *supra*, and this appeal followed, see note 1, *supra*.

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

SUMMARY OF ARGUMENT

I

The only showing in support of appellant's motion for an independent psychiatric examination was the fact that the results of an IQ test administered by Saint Elizabeths Hospital differed by fourteen points from one administered by the Navy twenty-two years before. Weighing against the motion were the public expense and the further delay of the trial that would be required by such an examination. In the circumstances of this case, the District Court did not abuse its discretion in denying the motion.

II

Appellant was allowed to place in evidence all of the records of past examinations on which Dr. Platkin partially rested his opinion that appellant was without mental disease or defect. He asked not a single question designed to show that Dr. Platkin was unfamiliar with these records or that the records were inconsistent with Dr. Platkin's opinion. The inadequacies of the cross-examination are not attributable to error by the trial court.

III

If the court's answer to the jury's question be read as a comment on the evidence, it was accurate and proper. The jury had been fully instructed that the court's comments on the evidence were not binding. In any event, it is not clear from the transcript that the answer was a comment on the evidence. The ambiguity of the transcript adds to the significance of the fact that appellant did not object to the answer. In these circumstances, his objection should not be heard for the first time on appeal.

ARGUMENT

I. The District Court did not abuse its discretion by refusing to order an independent psychiatric examination.

(See Hr.A 2-3; Hr.B 2-3; Hr.C 5-6; Tr. 81-86)

Appellant contends that the District Court abused its discretion in not ordering a second examination of his mental condition by another agency because the results of an IQ test administered at Saint Elizabeths Hospital differed by fourteen points from an examination administered by the Navy twenty-two years earlier.[4] His oral

[4] The evidence at the trial showed that the Navy examination, performed in 1942, disclosed an IQ of 61. Saint Elizabeths' examination, performed in 1964, disclosed an IQ of 75, which is in the borderline range between normal and subnormal intelligence.

motion for such an examination was made six weeks after Saint Elizabeths had completed its 90-day observation and found him to be without mental disease or defect. In making the motion, appellant's counsel made no showing that Saint Elizabeths was ill-equipped to diagnose cases of mental deficiency or that Saint Elizabeths' examination had in fact been inadequate or "slanted" against appellant's interests. He did not aver that Saint Elizabeths had ignored the Navy's test results in reaching its opinion. He did not explain why he had waited almost to the eve of trial to make the motion and did not even try to dissuade the Chief Judge from the belief that granting the motion would have delayed the trial even further. Finally, though he represented that no fee would be required for an examination by the D.C. Bureau of Mental Retardation, the inference is that this apparent gratuity would have been merely an accounting courtesy; the cost would still have been borne by the public. (Hr.A 2-3; Hr.B 2-3; Hr.C 5-6.)

In the light of these facts, appellant's contention almost bears its refutation on its face, if there is anything to the notion that this is an area of the trial court's discretion. See *Cooper* v. *United States*, —— U.S. App. D.C. ——, 337 F.2d 538 (1964); *cf. Watson* v. *Cameron*, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962). It is difficult to imagine a less compelling request for an independent psychiatric examination than this one, unless it be one for which no grounds at all are stated. Though "the defendant has the right to assistance of the court in developing the basis for his insanity defense," *Brown* v. *United States*, 118 U.S. App. D.C. 76, 77, 331 F.2d 822, 823 (1964), that principle does not mean that the court must

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Dr. Platkin testified that tested "intelligence" may change over the years, but that the tests used are sufficiently reliable that significant variations between different examiners and different tests with respect to the same individual at about the same time are unusual. (Tr. 81-86.) Thus, to the extent that appellant's insanity defense depended on developing expert testimony to contradict Saint Elizabeths' findings, the chances were probably slim.

assist the defendant in shopping for experts until he finds one whose testimony will be favorable. *Perry* v. *United States*, —— U.S. App. D.C. ——, 347 F.2d 813, 816 (1964); *Cooper* v. *United States*, *supra*, 337 F.2d at 539 (concurring opinion). The court discharges its duty when it enables the defendant to be adequately and impartially examined by a properly-equipped facility. This was done in the instant case. The trial court did not abuse its discretion by refusing to do more.

II. Appellant's cross-examination of Dr. Platkin was not improperly limited by the trial court.

(See Tr. 75, 82-89, 90-92, 93-94, 96-97)

When Dr. Platkin testified about appellant's mental condition, he had in his possession records obtained by Saint Elizabeths Hospital from other agencies which had examined appellant in the past (Tr. 90). He based his opinion in part on appellant's "history," as revealed by these records (Tr. 75). Appellant's counsel was legally entitled to inquire what weight the records had upon Dr. Platkin's opinion, whether any parts of the records were inconsistent with that opinion, and how Dr. Platkin resolved the inconsistencies. Unfortunately, he did not do this. As a result, the psychodynamic picture projected at the trial was, at best, sketchy. Appellant blames the trial court for this inadequacy. But appellee submits that a careful reading of the transcript clearly shows that the fault lies elsewhere.

As the first step in cross-examining Dr. Platkin about the records of appellant's past examinations, counsel undertook to establish the contents of those records. After a series of questions designed to prove the contents by means of Dr. Platkin's oral testimony (Tr. 82-89), the trial court observed that the reports themselves could be introduced in evidence. When counsel replied that he did not wish to do so, the court ruled that "until the reports are introduced in evidence, I shall not permit you to elicit the contents of those reports on cross-examinaion" (Tr. 90). This was a proper application of the best evidence

rule, and was well within the scope of the trial court's discretion to control the manner of proof. See *e.g.*, *Gordon* v. *United States*, 344 U.S. 414, 421 (1953); *cf. Meyers* v. *United States*, 84 U.S. App. D.C. 101, 113-114, 171 F.2d 800, 812-813 (1948), *cert. denied*, 336 U.S. 912 (1949); *Alexander* v. *United States*, 326 F.2d 736 (4th Cir. 1964). See also Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 512-514 (1962).

Appellant's counsel then offered the reports in evidence and they were received (Tr. 90-92). With the foundation thus laid, one would suppose that appellant's counsel might then have started to explore Dr. Platkin's knowledge of and reliance upon the reports. He might have asked questions in such form as: "When you formulated your opinion, did you know that . . .?" "In arriving at your opinion, did you consider . . .?" "And is this finding not inconsistent with . . .?" "And how do you square this finding with your opinion that . . .?" This is a line of questioning he might have pursued. *It is not the line of questioning he did pursue.* After the records were received in evidence, the cross-examination proceeded as follows:

"BY MR. LEWIS:

"Q Now, Doctor, when we adjourned I believe we were discussing the discharge report of Leroy Sessoms in 1948, is that correct?

"A That is correct.

"Q And *does that discharge record indicate*, Doctor, any neurotic disturbance on the part of Leroy Sessoms?

"A It makes reference to a history of long-standing neurotic disturbance.

"Q And *does it make any reference* to a civilian adjustment —

"THE COURT: I suggested to you before that if you want the contents or any part of the contents to come out in court, you have to offer the document in evidence. I don't think you can get its contents into evidence indirectly in this manner.

* * * *

[During the colloquy that ensued it developed that the document referred to was already in evidence.]

"THE COURT: Very well. The document is in evidence and I told you that you have a right to read to the jury all parts of that exhibit that you consider desirable to read. But you may not ask the witness to tell you what the contents of the document are. The document speaks for itself. . . .

* * * *

"MR. LEWIS: May I ask him about any reference which St. Elizabeths—

"THE COURT: It all depends upon what the question is. But, certainly, you shouldn't ask him does such-and-such a document read so-and-so. You can read that document to the jury at the proper time.

(Pause)

"MR. LEWIS: I have no further questions, Your Honor." (Tr. 93-94, 96-97.) (Emphasis added.)

In truth, every question asked by appellant's counsel about the records of past examinations, both before and after the records were received in evidence, was designed solely to establish the contents of the records. Counsel asked not a single question designed to show, as he now puts it, "that such records were inconsistent with the expert's opinion, and that perhaps the witness had not fully familiarized himself with the records before formulating his opinion" (Br. 15). Rather, he simply abandoned the entire cross-examination when an elementary rule of evidence was correctly applied to his preliminary proof. His characterization of this occurrence as error on the part of the trial court is unfounded. The court was not required to read his mind. His later thoughts about the best strategy for discrediting Dr. Platkin as well as his general observations on the right of cross-examination are purely academic at this stage of the proceedings.

III. The supplementary instructions to the jury were not erroneous

(See Tr. 98-99, 137-138, 143, 154, 165.)

After commencing its deliberations, the jury sent in a note inquiring whether a mental defect at the time of the crime would be sufficient to warrant a verdict of not guilty by reason of insanity. The trial court replied that it would, unless the government had borne its burden of proving beyond a reasonable doubt that there was no causal connection between the mental defect and the crime. The court then went on to discuss the Government's position on this issue:

> "Now, as I understand it, the government contends that Dr. Platkin's testimony is sufficient to disprove any causal connection, and there is no evidence to the contrary, as I understand it. Now whether that is sufficient or not would be for you to determine. I have just told you what the contention is." (Tr. 165.)

Appellant did not object to this reply. On this appeal, however, he contends for the first time that it was prejudicially erroneous because it improperly placed the burden of proving insanity on the defendant and misleadingly commented on the weight of the evidence. Neither of these contentions is well-founded.

Immediately before the challenged sentences, the trial court expressly reiterated that the burden of negating causation beyond a reasonable doubt was on the Government (Tr. 165). In this context, no reasonably attentive juror could have understood the observation that "there is no evidence to the contrary" of Dr. Platkin's testimony as requiring the defendant to come forward with contradictory evidence in order to create a reasonable doubt, especially in view of the reminder that immediately followed: "whether that is sufficient or not would be for you to determine." *Cf. Lawson* v. *United States*, 101 U.S. App. D.C. 332, 248 F.2d 654 (1957), *cert. denied*, 355 U.S. 963 (1958).

If the observation that "there is no evidence to the contrary" be taken as a comment on the weight of the evidence, it was both accurate and proper. Dr. Platkin had testified that there was "no significant connection" between appellant's borderline intelligence quotient and the alleged criminal acts (Tr. 98-99). His was the only direct testimony on the subject. For the court to have mentioned this fact in the supplementary instruction was not improper, and it did not constitute an unwarranted invasion of the jury's function. The trial court had already instructed the jury at great length on their function as fact-finders and had admonished them that the court's observations on the evidence were not binding.[5]

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[5] "Ladies and gentlemen of the jury, it is my information that for some of you this is your first participation as jurors in a trial in this Court at this term of Court. For that reason I shall make my remarks perhaps a little more elaborate than I otherwise might, and I shall commence my discussion with a preliminary recapitulation and explanation of our respective duties, your duty and function, and my duty and function.

* * * *

"In addition to instructing the jury as to the law, the Court has a further function to perform, and that is to summarize, to discuss and to comment on the facts and on the evidence in order to aid and assist the jury in arriving at its conclusions on the facts. But the Court's summary and discussion and comments on the facts and on the evidence are not binding on you; they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If in any respect your recollection or your understanding or your view of the evidence differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail, because as I said before, the final decision on the facts is entirely within your domain. My instructions are binding on you only as concerns the law.

* * * *

". . . I repeat again that my summary of the evidence is not binding on you; it is intended only to help you. You must make your own decision on the facts and on the evidence.

* * * *

"Now then in conclusion, ladies and gentlemen of the jury, I want to say to you again that my summary of the evidence is not binding on you, it is intended to help you only, and you must draw on your own recollection, your own understanding and your view of the

Having clearly left the factual issues to the jury's determination, the court's brief and accurate guidance was not improper. *Bolden* v. *United States*, 105 U.S. App. D.C. 259, 266 F.2d 460 (1959).

The foregoing discussion assumes that appellant's reading of the now-challenged instruction is correct, an assumption which appellee is unwilling to make. In his brief, appellant expresses his understanding of the instruction by a *mélange* of paraphrases and fragmentary quotations (Br. 7-8, 9-10, 22, 24). (Evidently the asserted error is not so "plain" that he can afford to quote the entire instruction without advocatory interjections.) From these, it may be inferred that appellant thinks the crucial sentence should be split in two and read this way:

> "Now, as I understand it, the government contends that Dr. Platkin's testimony is sufficient to disprove any causal connection. There is no evidence to the contrary, as I understand it."

But appellant's reading makes no more sense than leaving the sentence in one piece and voicing the implied conjunction, with this result:

> "Now, as I understand it, the government contends that Dr. Platkin's testimony is sufficient to disprove any causal connection, and that there is no evidence to the contrary, as I understand it."

Besides preserving the integrity of the sentence *as spoken by the trial court*, the latter reading solves appellant's perplexity (Br. 24-25) in trying to identify the antecedent of "that" in the sentence following: "Now whether that [contention] is sufficient or not would be for you to determine. I have just told you what the contention is." Which of these two interpretations did the trial court intend? Which did the jury understand? If these questions must

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evidence and make a decision on the facts as you find them to be from the evidence, and then having found the facts, apply the rules of law to them as I have given them to you. That is your function, your duty and your responsibility." (Tr. 137, 138, 143, 154.)

be faced at the appellate level, the putative error is surely not "plain."

Only those who were present and heard the court's intonation of the now-challenged words could tell us precisely what they meant. If an objection had been interposed by appellant's counsel, we would at least know that the asserted error was apparent in the oral delivery rather than being a fortuitous discovery in the typewritten transcript. The court would have been able to correct what may have been a slip of the tongue and to disabuse the jury of any misapprehension. Appellant's belated attack upon these few words in the supplementary instruction can be sustained only by disparaging these corrective devices and declaring that trial objections are a pointless ritual. The letter and spirit of Rule 30, Fed. R. Crim. P., declare the contrary. By failing to object, appellant's counsel is foreclosed from raising this issue. *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 281-283, 184 F.2d 394, 401-403 (1950).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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